UNITED STATES DISTRICT COURT
DISTRICT OF MAINE

ERIC D. MURPHY,	)	
	)	
Plaintiff	)	
	)	
v.	)	Civil No. 98-0439-P-C
	)	
MARTIN MAGNUSSON, et al.,	)	
	)	
Defendants	)	

RECOMMENDED DECISION

Plaintiff, a former inmate at the Maine Correctional Center, filed this four count Complaint on December 17, 1998. He alleged first that Defendant Correctional Medical Services ["CMS"] and two of its employees, Defendants Walker and Rouillard, exhibited deliberate indifference to his serious medical needs in violation of his right under the eighth amendment to be free from cruel and unusual punishment. This allegation, designated as "Count I" by the Court, was dismissed by the Court by Order dated July 27, 1999. In "Counts II and III," Plaintiff alleges that Defendants Marcoux, Howard, Christensen, and Lowell denied his various requests for transfer within the prison system, in violation of the Americans with Disabilities Act, 42 U.S.C. section 12101-12213 ["ADA"], and Section 504 of the Rehabilitation Act, 29 U.S.C. section 794. In "Count IV," Plaintiff asserts a claim against Defendants Magnusson, Clemons, McKeen, and Blanchard for their failure to stop

the alleged discrimination. All of the remaining Defendants are party to a Motion to Dismiss Plaintiff's Complaint for his failure to state a claim upon which relief may be granted. When analyzing such a motion, the Court accepts all of Plaintiff's factual averments as true, and indulges all reasonable inferences in his favor. *El Dia, Inc. v. Rossello*, 165 F.3d 106, 108 (1st Cir. 1999) (citation omitted).

1. ADA and Section 504 – Counts II and III.

Defendants Marcoux, Howard, Christensen, and Lowell seek dismissal of Plaintiff's claim in Count II on the grounds that there is no individual liability under the ADA. They seek dismissal of Plaintiff's claim in Count III on the grounds that Plaintiff has not alleged that these Defendants were in a position to accept or reject federal funding.[1] The Court agrees with both assertions.

Plaintiff's claim under the ADA arises under Title II, which provides:

> Subject to the provisions of this subchapter, no qualified individual with a disability shall, by reason of such disability, be excluded from participation in or be denied the benefits of the services, programs, or activities of a public entity, or be subjected to discrimination by any such entity.

42 U.S.C. § 12132. The term "public entity," as relevant to this action, is defined as "(A) any State or local government; [and] (B) any department, agency, special purpose district, or other instrumentality of a State or States or local government."

[1] Nor, indeed, has Plaintiff asserted that the "public entity" at issue receives federal funding.

42 U.S.C. § 12131(1). A state prison is undeniably a "public entity" within the meaning of Title II of the ADA. *Pennsylvania Dept. of Corr. v. Yeskey*, 524 U.S. 206 (1998). The issue is whether these Defendants, correctional officers responsible for various programs within the Maine Correctional Center, may be sued under the Act.

Defendants assert that Title II, prohibiting discrimination by public entities, should be interpreted to prohibit suits against defendants in their individual capacities. This Court has previously ruled that individual-capacity suits are not permitted under Title I which prohibits discrimination in employment. *Quiron v. L.N. Violette Co.*, 897 F. Supp. 18, 20 (D. Me. 1995). In the employment context, the issue was even less clear, as the ADA's definition of "employer" includes the employer's "agents." 42 U.S.C. § 12111(5)(A). This Court has nevertheless concluded that various other provisions of the statute protecting small businesses from liability could not be reconciled with a provision that would impose liability upon supervisors individually. *Quiron,* 897 F. Supp. at 20. This concern is at least as great in the context of "public entities." Other courts have reached the same conclusion. *Alsbrook v. City of Maumelle*, 184 F.3d 999, 1005 n.8 (8th Cir. 1999); *Montez v. Romer,* 32 F. Supp. 2d 1235, 1241 (D. Mass. 1999). Accordingly, Plaintiff should not be permitted to maintain her ADA claim against these Defendants in their individual capacities.

Plaintiff's claim under the Rehabilitation Act fails as well. Section 504 of the Rehabilitation Act prohibits discrimination on the basis of disability in the provision of benefits or services by programs receiving Federal financial assistance. 29 U.S.C. § 794(a). Accordingly, at least one court in this Circuit has held that individual defendants may only be liable under the Act if they are "'in a position to accept or reject federal assistance.'" *Guckenberger v. Boston Univ.*, 957 F. Supp. 306, 323 (D. Mass. 1997) (quoting *Glanz v. Vernick*, 756 F. Supp. 632, 637 (D. Mass. 1991)). Although in that District a plaintiff's complaint need not specifically allege that defendants make decisions regarding federal financial assistance, the claim may be dismissed if there are no facts alleged that would allow an inference that they are in a position to do so. *Id*. In *Guckenberger*, for example, plaintiffs' claim against a defendant who was alleged to assist in reviewing applications for reasonable accommodation was dismissed, the court finding that there were insufficient facts to support an inference that the defendant was "in a position to control the influx of federal dollars." *Id*. These Defendants stand in a similar position. Each of them is alleged to be a member of a classification subcommittee responsible for making recommendations regarding inmate transfers and participation in various prison programs. The allegation that they make recommendations (presumably, to the ultimate decisionmakers) provides an insufficient basis to infer they have decision-

making authority with respect to the receipt of federal funding. The Court therefore concludes that they may not be held personally liable under the Rehabilitation Act. For the foregoing reasons, I recommend that the Court grant Defendants Marcoux, Howard, Christensen, and Lowell's Motion to Dismiss Counts II and III of the Complaint.

II. Section 1983 – Count IV.

Defendants Marcoux, Howard, Christensen, and Lowell also assert that Plaintiff may not couch his otherwise improper ADA and Section 504 claims as a claim under Section 1983. This Court previously construed the Section 1983 claim as applying to Defendants Magnusson, Clemons, McKeen, and Blanchard. These Defendants also move to dismiss that claim, on the grounds that Plaintiff has not alleged that they were personally deliberately indifferent to his "rights . . . secured by the Constitution and laws." 42 U.S.C. § 1983. However, the Court deems it necessary to first address the question raised by Defendants Marcoux, *et al.*, namely: do Plaintiff's statutory rights under the ADA and Section 504 constitute "rights" within the meaning of Section 1983? The Court concludes that they do not, and Plaintiff's Section 1983 claim in "Count III" of the Complaint should be dismissed.

The Supreme Court first announced that Section 1983 would be available to redress statutory, as well as constitutional, rights in 1980. *Maine v. Thiboutot*, 448

U.S. 1, 4 (1980). There are two exceptions to that rule. The first exception is where the statute is found not to create enforceable rights. *Wilder v. Virginia Hosp. Assoc.*, 496 U.S. 498, 508 (1990). The second is where "Congress has foreclosed such enforcement of the statute in the enactment itself." *Id*. Defendants assert that it is the second exception that operates to bar Plaintiff's Section 1983 claim in this case.

It is Defendants' burden to demonstrate that Congress intended to preclude enforcement of a particular statute through the mechanism of Section 1983. *Veal v. Memorial Hosp. of Wash. County*, 894 F. Supp. 448, 453 (1995). Such proof can come in the form of an express statement in the statute, or "'when the statute itself creates a remedial scheme that is "sufficiently comprehensive . . . to demonstrate congressional intent to preclude the remedy of suits under § 1983."'" *Id*. (quoting *Wilder*, 496 U.S. at 21 (other citation omitted)).

Several courts have found that the remedial schemes of both the ADA and Section 504 are "sufficiently comprehensive" to bar claims under Section 1983. *Alsbrook*, 184 F.3d at 1011 (ADA); *Holbrook v. City of Alpharetta, Ga.*, 112 F.3d 1522, 1531 (11th Cir. 1997) (both); *Meara v. Bennett*, 27 F. Supp. 2d 288, 292 (D. Mass. 1998) (ADA); *Silk v. City of Chigaco*, No. 95-C-0143, 1996 WL 312074, *19 (N. D. Ill. June 7, 1996) (both); *Veal*, 894 F. Supp. 448, 454 (M.D. Ga. 1995) (Section 504). Of course, it is only those rights for which redress is available under these

statutes that may not be raised in a 1983 action. *Veal*, 894 F. Supp. at 454 (citing *Smith v. Barton*, 914 F.2d 1330, 1335 (9th Cir. 1990)). Put another way, Section 1983 is not available when the only rights alleged to have been violated were created by these two statutes. *Holbrook*, 112 F.3d at 1531. It is this fact that persuades the Court to find preclusion in this case. Plaintiff's Complaint sets forth only one factual allegation supporting his claim that he was subjected to cruel and unusual punishment, as opposed to discrimination on the basis of his disability. Specifically, he alleges that Defendant Walker did not respond to his request for an extra mattress, shoes and medications, all of which are necessary to prevent further disability. Comp. at ¶¶ 34-35. However, Plaintiff's claim against Defendant Walker under Section 1983 was dismissed by Order dated July 27, 1999. The rest of Plaintiff's factual allegations support only his claims of disability discrimination. His rights to be free from discrimination on the basis of his disability were created by the ADA and Section 504. These statutes provide avenues for Plaintiff to seek redress. Accordingly, the Court finds Plaintiff is precluded from raising these issues as a claim under Section 1983.

Conclusion

For the foregoing reasons, I hereby recommend Defendant's Motion to Dismiss (Docket No. 11) be GRANTED, and the Complaint DISMISSED.

NOTICE

A party may file objections to those specified portions of a magistrate judge's report or proposed findings or recommended decisions entered pursuant to 28 U.S.C. § 636(b)(1)(B) (1988) for which *de novo* review by the district court is sought, together with a supporting memorandum, within ten (10) days of being served with a copy thereof. A responsive memorandum shall be filed within ten (10) days after the filing of the objection.

Failure to file a timely objection shall constitute a waiver of the right to *de novo* review by the district court and to appeal the district court's order.

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Eugene W. Beaulieu
United States Magistrate Judge

Dated on: December 3, 1999